APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MERLE E. HANLIN by JILL A. McCRACKEN ESQUIRE, Special Guardian, Plaintiff	: CIVIL ACTION 1:CV-96-0441 : FILED HARRISBURG, PA : NOV 18, 1997 :MARY E. D'ANDREA, CLERK
vs.	
JOHN G. HANLIN, Defendant and Third Party Plaintiff	
vs.	
JERLE H. MARTIN and DOES 1 through 50, inclusive, Third Party Defendants	

MEMORANDUM

Before the Court is a motion filed by Jerle H. Martin and James Hanlin ("Movants") to substitute themselves as Plaintiffs in the above-captioned suit. The parties have briefed the issues and the motion is ripe for disposition.

I. Background

The instant suit arises from a written agreement (the "Agreement") executed between Plaintiff Mrs. Merle Hanlin and Defendant John G. Hanlin, her son. Plaintiff filed a complaint alleging that under the Agreement, she lent $100,000.00 to Defendant. As alleged, the Agreement provides further, in relevant part, as follows:

1. First Party [Defendant] will pay off the above obligation to Second Party [Plaintiff] in monthly

> installments of Three Thousand ($3,000.00) Dollars on October 1, 1994 and a like sum on the first (1st) day of each month thereafter until said obligation of One Hundred Thousand ($100,000.00) Dollars is fully paid.
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> . . .
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> 3. Should Second Party [Plaintiff] die before the aforesaid obligation is fully paid, Second Party [Defendant][1] will continue payments thereon to Second Party's [Plaintiff's] children, Jerle E. Martin and James E. Hanlin [Movants], in equal shares.

(Compl. Exhibit P-2). Plaintiff further alleges that Defendant is in default on the payments, and is suing to recover the amount in default.

On May 26, 1997, subsequent to filing a complaint, Plaintiff passed away. Plaintiff's will was probated by Defendant in Franklin County, Pennsylvania, and Defendant was named executor of Plaintiff's estate. Letters testamentary were granted to Defendant on June 4, 1997. Defendant, therefore, has been placed in the curious position of legal representative of the plaintiff in a lawsuit in which he is also the defendant. Defendant has not, however, moved to substitute himself--in his capacity as executor of Plaintiff's estate--as Plaintiff; nor has Defendant taken any other action on Plaintiff's behalf with respect to the instant suit. Movants filed the instant motion to substitute themselves as Plaintiffs in the instant suit.

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[1] The context of the Agreement makes it apparent that Paragraph 3 contains a typographical error, and that the Agreement purports to require that upon Plaintiff's death, Defendant would pay the remainder of his obligation to Movants.

II. Discussion

Movant argue that under Fed. Rule Civ. P. 25(a)(1) they are proper parties to be substituted for Plaintiff and to sue on her behalf, asserting that their personal interests in the Agreement comport with, and are derived from, Plaintiff's interests. In the alternative, Movants argue that they should be joined as Plaintiffs pursuant to Fed. Rule Civ. P. 17(a) as real parties in interest.[2] The court, however, holds that Fed. Rule Civ. P. 25(c)--rather than Rule 25(a)--is the appropriate vehicle for substitution of plaintiff in the instant case. Movants' arguments and the court's analysis of the application of Rule 25(c) will be addressed seriatim.

A. Rule 25(a): Substitution When a Party Dies

Rule 25(a) provides, in relevant part, as follows:

> If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party. . .

Fed. Rule Civ. P. 25(a)(1). Effectively, Rule 25(a) allows a

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[2] Movants did not argue they should be substituted as plaintiffs under Rule 17(a) in their principal brief in support of the instant motion, but rather, raised this argument in their reply brief. Parties are generally not permitted to introduce new arguments in reply briefs, since the opposing party does not have the opportunity to respond to such arguments. United States v. Boggi, 74 F.3d 470, 478 (3d Cir. 1996). However, the court will make an exception and address Movants' Rule 17 argument in this case.

substituted plaintiff to continue the action and defend the interests of the deceased plaintiff. Thus the court's inquiry under Rule 25(a)(1) is as follows: (1) does the claim survive the death of the plaintiff; and (2) are Movants the "proper parties" to be substituted?

Movants assert, and Defendant doe not deny, that Plaintiff's claim is not extinguished by her death. The court agrees. Whether a cause of action survives the death of a party is a question of substantive, not procedural, law. 7C Wright, Miller & Kane, Federal Practice and Procedure §1952 (2d ed. 1986). Thus the court must look to the applicable substantive law for guidance--in this case, Pennsylvania law. Id. Pennsylvania law provides that "all causes of action or proceedings, real or personal shall survive the death of one or more joint plaintiffs or defendants." 42 PA. CONS. STAT. ANN. § 8302. Therefore, Plaintiff's claim survives her death.

Movants argue further that they are "proper parties" to be substituted for Plaintiff because they have a direct interest in any recovery on behalf of the Plaintiff's estate. Further, Movants assert that Defendant's personal interest in the instant suit is in conflict with his duties as legal representative and executor of Plaintiff's estate.[3] Movants cite no authority, however, which indicates that their personal interests are relevant to the determination of

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[3] Defendant's alleged conflict of interest as both Defendant in the instant case and executor of Plaintiff's estate is not an issue before the court. Defendant has not moved for substitution as plaintiff and, moreover, Movants do not attempt to remove Defendant as executor of Plaintiff's estate. Rather, the issue for the court's determination is whether Movants should be properly substituted for Plaintiff.

whether they are "proper parties" to substitute as Plaintiffs under Rule 25(a). Rather, Movants cite McSurely v. McClellan, 753 F.2d 88 (D.C. Cir. 1985) for the proposition that under certain circumstances, the court may substitute someone other than a party's legal representative under Rule 25(a). In McSurely, the court permitted substitution of the distributee of an unprobated estate as a "proper party" under Rule 25(a). The context of Plaintiff's estate in the instant case is distinguishable from that in McSurely, however. Plaintiff's estate remains in the initial stages of probate proceedings, and has not been distributed. Thus McSurely does not guide the court's analysis of whether Movants are "proper parties" for substitution.

The weight of authority on this issue indicates that the "proper party" for substitution under Rule 25(a) is the legal representative of the estate. See Rende v. Kay, 415 F.2d 983 (D.C. Cir. 1969); Madison v. Vintage Petroleum, Inc., 872 F. Supp. 340 (1994). The Third Circuit Court of Appeals has stated that, "the most liberal construction of [Rule 25(a)] would not permit substitution of a party's attorney who did not have status as legal representative of the deceased party's estate." Boggs v. Dravco Corp., 532 F.2d 897, 900 (3d Cir. 1976). Therefore, Movants are not "proper parties" for substitution under Rule 25(a), and the court will not order substitution pursuant to this Rule.

B. **Rule 17(a): Real Party in Interest**

Movants argue, in the alternative, that they should be substituted as Plaintiffs to defend their personal interests in the instant dispute pursuant to Fed. Rule Civ. P. 17(a).

Rule 17(a) provides, in relevant part, as follows:

> Every action shall be prosecuted in the name of the real party in interest. . . . No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification or commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Fed. Rule Civ. P. 17(a). Movants argue that because the Agreement which is the subject of the instant case provides that Movants are entitled to the uncollected balance of the loan, they became the real parties in interest upon the death of Plaintiff. Rule 17(a), however, applies only when a person becomes the real party in interest because of a transfer of interest prior to the commencement of the suit. See 7C Wright, Miller & Kane, Federal Practice and Procedure § 1958 (2d e. 1986). In the instant case, the Agreement transferred Plaintiff's interest to Movants upon Plaintiff's death. Since this occurred after commencement of the suit, Movants cannot be substituted as plaintiffs pursuant to Rule 17(a).

C. Rule 25(c): Substitution When a Transfer of Interest Occurs During the Course of an Action

The court notes that the parties did not brief the issue of substitution pursuant to Rule 25(c). The court, however, has the discretion to substitute a party pursuant to Rule 25(c), and in the interests of judicial economy, it will

address the propriety of substitution under this rule.

Rule 25(c) provides, in pertinent part, as follows:

> In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

Fed. Rule Civ. P. 25(c). "Because . . . substitution under Rule 25(c) does not ordinarily alter the substantive rights of parties but is merely a procedural device designed to facilitate the conduct of a case, a Rule 25(c) decision is generally within the district court's discretion." Luxliner P.L. Export v. RDI/Luxliner, 13 F.3d 69, 71-72 (3d Cir. 1993). "Rule 25(c) . . . is designed to allow the action to continue unabated when an interest in the lawsuit changes hands." Matter of Covington Grain Co., Inc., 638 F.2d 1362, 1364 (5th Cir. 1981). Rule 25(c), as distinguished from Rule 17(a), deals with the situation where a transfer of interest takes place during the course of the action. 2 Moore's Manual: Federal Practice and Procedure, § 1309[6]; Pacamor Bearing, Inc. v. Minebea Co., Ltd., 892 F. Supp. 347 (D.N.H. 1995).

Courts have found that an involuntary transfer of an interest by reason of the death of a party is to be analyzed solely according to Rule 25(c). See Hofheimer v. McIntee, 179 F.2d 789, 792 (7th Cir. 1950). The transfer of interest in the instant situation, however, came about voluntarily due to the Agreement, rather than solely by reason of Plaintiff's death. The Agreement provides for the transfer of Plaintiff's interest to Movants upon Plaintiff's death.

The instant suit was filed prior to Plaintiff's death, and thus the transfer of interest to Movants occurred during the pendency of the suit. Therefore, the court finds Rule 25(c) the appropriate mechanism by which to substitute Movants for Plaintiff in the instant situation.

III. **Conclusion**

Based on the foregoing discussion, Movants' motion for substitution of plaintiff will be granted. An appropriate order will issue.

/S/ SYLVIA H. RAMBO
SYLVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

Dated: November 18, 1997.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MERLE E. HANLIN by JILL A. McCRACKEN ESQUIRE, Special Guardian,	: CIVIL ACTION 1:CV-96-0441
Plaintiff	: FILED HARRISBURG, PA NOV 18, 1997 :MARY E. D'ANDREA, CLERK
vs.	
JOHN G. HANLIN,	
Defendant and Third Party Plaintiff	
vs.	
JERLE H. MARTIN and DOES 1 through 50, inclusive,	
Third Party Defendants	

ORDER

In accordance with the accompanying memorandum or law, **IT IS HEREBY ORDERED THAT:**

1) Movants' motion for substitution of Plaintiff is **GRANTED**.

2) Jerle H. Martin and James Hanlin shall be substituted as Plaintiffs in the place of Merle E. Hanlin, by Jill A. McCracken, Esquire, Special Guardian, pursuant to Rule 25(c) of the Federal Rules of Civil Procedure.

3) The clerk of court shall amend the caption accordingly.

4) This case is placed on the February 1998 trial list. Jury selection for cases on the February list will begin

at 9:30 a.m. on Monday, February 2, 1998, in Courtroom No. 3, Eighth Floor, Federal Building, Third and Walnut Streets, Harrisburg, Pennsylvania. Trials will commence following the competition of jury selections. A date certain for trial may be discussed at the pretrial conference; however, counsel are expected to be prepared to go forward with trial at anytime during the trial term.

5) Pretrial memoranda shall be filed on or before 12 o'clock noon on Friday, January 23, 1998, in conformity with the local rules.

6) The pretrial conference is scheduled for Friday, January 30, 1998 at 10:00 a.m. on the chambers of Courtroom No.3.

/S/ SYLVIA H. RAMBO
SYLVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

Dated: November 18, 1997.

APPENDIX C

APS-169

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 98-7039

JERLE H. MARTIN, ET AL.

vs.

JOHN G. HANLIN

Appellant

(M.D. Pa. Civ. No. 96-cv-00441)

Present: BECKER, CHIEF JUDGE, NYGAARD and ROTH, CIRCUIT JUDGES

Submitted are:

(1) By the Clerk for possible dismissal due to a jurisdictional defect;

(2) Appellees' motion to quash;

(3) Appellees' brief in support thereof; and

(4) Appellant's brief in opposition thereto in the above-captioned case.

Respectfully,

Clerk

PDS/JAD/je

ORDER

The Motion to Quash is granted and the foregoing appeal is dismissed for lack of jurisdiction because it is not appealable at this time. See 28 U.S.C. § 1291; see also Bauer v. Commerce Union Bank, Clarksville, Tennessee, 859 F.2d 438, 440 (6th Cir. 1988).

By the Court,

/S/ EDWARD R. BECKER
Chief Circuit Judge

DATED: May 15, 1998

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7039

JERLE H. MARTIN, ET AL.
v.
JOHN G. HANLIN, Appellant
(M.D. Pa. Civ. No. 96-cv-00441)

Present: BECKER, Chief Judge, SLOVITER, STAPLETON, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE, and RENDELL, Circuit Judges,

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SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

/S/ EWARD R.BECKER
Chief Circuit Judge

DATED: June 29 1998